In the Supreme Court
OF THE
United States

JAN 22 19
CHARLES ELMORE

OCTOBER TERM, 1950

No. 510

VUKA RADOVICH STEPOVICH, Executrix of the Estate of Mike Stepovich, Deceased,
Petitioner,

vs.

NICK KUPOFF, JAMES ZUKOEV, MIKE KITOFF, NICK KABAK, a partnership doing business under the firm name and style of North Star Mining Company,
Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

FRANCIS R. KIRKHAM,
SOUTHALL R. PFUND,
ALLAN R. MOLTZEN,
225 Bush Street, San Francisco 4, California,
Attorneys for Petitioner,
Vuka Radovich Stepovich, Executrix of the Estate of Mike Stepovich, Deceased.

JULIAN A. HURLEY,
Fairbanks, Alaska,
Of Counsel.

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Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The above-named petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the

United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause (R. 319), reversing the judgment of the District Court for the Territory of Alaska, Fourth Judicial Division (R. 23).

OPINIONS AND ORDERS BELOW.

The judgment of the District Court is at R. 23. Its order setting aside the appeal is at R. 30. Its order reinstating the appeal is at R. 34. No opinions were filed by the District Court.

The order of the Court of Appeals reinstating the appeal is at R. 335. Its order denying a motion to dismiss the appeal is at R. 306. No opinion was filed with either order.

The opinion of the Court of Appeals on the merits (R. 309) is reported in 184 F. (2d) 705.

JURISDICTION.

The judgment of the Court of Appeals was entered October 25, 1950. A petition for rehearing was denied December 12, 1950 (R. 320). Jurisdiction of this Court is invoked under Sections 1254 and 2101 of the Judicial Code (Act of June 25, 1948, c. 646, secs. 1254, 2101; 62 Stat. 928, 961; 28 U.S.C. 1254, 2101).

STATUTES INVOLVED.

The statutes involved are set forth in the appendix to this petition and are as follows:

Act of February 13, 1925, c. 229, sec. 8(c); 43 Stat. 940;

Act of June 25, 1948, c. 646, secs. 1291, 1294(2), 2107, 38; 62 Stat. 929, 930, 963, 992.

STATEMENT OF THE CASE.

A single issue is presented by this petition—the jurisdiction of the Court of Appeals. The facts relevant to this issue are as follows:

The complaint in the District Court alleged that between August 24, 1942, and November 1, 1943, Mike Stepovich, petitioner's testator, interfered with the operation by respondents of certain mining properties in Alaska under lease to them from Stepovich. Mike Stepovich died September 21, 1944 (R. 3). It was not until October 15, 1945, almost three years after the alleged wrong and one year after Stepovich's death that respondents' first complaint was filed (R. 17). Respondents' second amended complaint was not filed until October 20, 1947 (R. 14).

The Judicial Code enacted June 25, 1948, became effective September 1, 1948 (Act of June 25, 1948, c. 646, sec. 38; 62 Stat. 992). Section 2107 thereof reads in part as follows:

> "Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before

a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

* * * * * * *

The district court, in any such action, suit or proceeding, may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree."[1]

The case came to trial on December 28, 1948 (R. 35), and on January 12, 1949, judgment on a directed verdict was entered in favor of petitioner (R. 23).

No further action was taken by any party to the suit until April 6, 1949,—eighty-four days after entry of judgment—when respondents filed in the District Court a notice of appeal (R. 25). Thereafter and on April 9, 1949, the District Court made its order allowing the appeal (R. 26).

After a hearing on a motion by petitioner, the District Court ordered the appeal set aside on May 6, 1949 (R. 30).

On June 25, 1949, respondents filed in the Court of Appeals a petition for a writ of mandamus, seeking to compel the District Court to vacate its order setting aside the appeal (R. 325). On August 8, 1949, the Court of Appeals ordered the writ to issue, directing the district judge to vacate his order of May 6, 1949, and to reinstate

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[1]The amendments to this section by the Act of May 24, 1949, c. 139, secs. 107, 108 (63 Stat. 104) are not material in the instant case.

the appeal (R. 335). No opinion was filed with this order.[2]

On October 18, 1949, after the cause was docketed in the Court of Appeals, petitioner filed a motion to dismiss the appeal on the ground that it was not timely, and a motion to strike the transcript (R. 288, 289). On October 27, 1949, respondents moved to strike these motions (R. 292, 294). On December 16, 1949, after the filing of the foregoing motions, but prior to oral argument, the Court of Appeals decided the case of *Cutting v. Bullerdick* (9 Cir. 1949) 178 F. (2d) 774, holding that Section 2107 of the Judicial Code applies to Alaska (see pages 8 and 9 infra). Nevertheless, petitioner's motions to dismiss the appeal and to strike the transcript were thereafter denied by the Court on January 17, 1950 (R. 306).[3]

On October 25, 1950, the Court of Appeals decided the case on the merits, reversing the judgment of the District Court and remanding the cause with directions to grant

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[2]In support of the petition respondents had argued before the Court of Appeals that section 2107 of the Judicial Code did not apply to Alaska (R. 328)—a contention specifically rejected by the same Court in *Cutting v. Bullerdick* (9 Cir. 1949) 178 F.2d 774, discussed hereinafter (pages 8 and 9).

[3]No opinion was filed with this order and no grounds for the ruling appear. Respondents argued (R. 298 et seq.) that the previous order of the Court of Appeals reinstating the appeal was *res judicata*—an obviously untenable contention. Such orders by their very nature are interlocutory. They are

> "but steps towards final judgment in which they will merge" (*Cohen v. Beneficial Loan Corp.* (1949) 337 U.S. 541, 546).

As the court said in *Montague County v. White* (Tex. 1923) 250 S. W. 736, 737:

> "Where a writ of mandamus is issued as an ancillary process to a pending suit, in aid of the jurisdiction of the court, such order will not be a final judgment; but where it is issued in response to an independent cause of action, based upon a petition filed, and where the order or judgment disposes of all matters in controversy as to all the parties to the suit, such a

a new trial (R. 319). Although the basic question before the Court on the petition for writ of mandamus and on the motion to dismiss the appeal was the jurisdiction of the Court of Appeals, and although this same question

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judgment is final, and in a civil suit an appeal would lie to the Court of Civil Appeals."

And see:

Cobbledick v. United States (1940) 309 U.S. 323, 325.

If any question on this score were possible it would be resolved by reference to the Court of Appeals' order granting the writ. The court said (R. 336):

"* * * It is Further Ordered that Honorable Harry E. Pratt, District Judge for the Territory of Alaska, Fourth Judicial Division be, and he hereby is directed to vacate his order of May 6, 1949, *herein*, setting aside the appeal theretofore allowed petitioners herein on April 9, 1949" (emphasis added).

Thus the Court of Appeals itself expressly points out that its ruling is simply a step in the pending case.

Such an order, like the comon law writ of certiorari to bring up the record, does not

"add any support to the appeal, which must stand or fall according as the statute did or did not allow it to be taken" (*Huguley Mfg. Co. v. Galeton Cotton Mills* (1902) 184 U.S. 290, 296).

In substance the ruling on the petition for a writ of mandamus is indistinguishable from the denial of a motion to dismiss an appeal, which is interlocutory in nature and reviewable only after final decision. See, for example, *Alaska Packers v. Pillsbury* (1937) 301 U.S. 174, where a motion to the Court of Appeals to dismiss an appeal was denied July 1, 1935, and this Court reviewed that ruling only after final judgment in the action on September 22, 1936, more than a year later (see pages 269, 270, 286 of the record in that case, No. 558, October Term, 1936).

It is, of course, "'familiar law that only a final judgment is *res judicata* as between the parties' *Merriam Co. v. Saalfield*, 241 U.S. 22, 28" (*United States v. Wallace Co.* (1949) 336 U.S. 793, 801).

Respondents further argued that the order on the petition for a writ of mandamus was the law of the case binding on the Court of Appeals (R. 299). Assuming that this may have been the reason for the court's decision on the motion to dismiss, it is not binding on this Court on ultimate review.

Hamilton Shoe Co. v. Wolf Brothers (1916) 240 U.S. 251, 258;

Panama Railroad v. Napier Shipping Co. (1897) 166 U.S. 280, 284.

was reserved in the brief on the merits, the Court of Appeals, in its opinion, did not refer to the question.

The jurisdiction of the Court of Appeals was again raised in the petition for rehearing which was denied without opinion on December 12, 1950 (R. 320).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the Ninth Circuit erred:

1. In entertaining the appeal and deciding the case on the merits, and in failing to hold that it was without jurisdiction of the appeal, for the reason that the appeal was not filed within the time required by Section 2107 of the Judicial Code, as enacted on June 25, 1948 (28 U.S.C. 2107).

REASONS FOR GRANTING THE WRIT.

1. **IN ENTERTAINING THE APPEAL AND FAILING TO HOLD IT WAS WITHOUT JURISDICTION THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT, WITH ITS OWN PRIOR DECISIONS, AND WITH DECISIONS OF THE COURTS OF APPEALS IN EVERY OTHER CIRCUIT ON AN IMPORTANT QUESTION OF FEDERAL LAW.**

Under Section 2107 of the Judicial Code, quoted at page 3, supra, which became effective September 1, 1948 (Act of June 25, 1948, Sec. 38; 62 Stat. 992), the time within which to file a notice of appeal is thirty days after entry of judgment. Notice of appeal in this case was not filed until eighty-four days after entry of judgment, nor was any document filed by respondents within thirty days after entry of judgment which could possibly be considered a notice of appeal.

Under the Judicial Code prior to September 1, 1948 (Act of February 13, 1925, c. 229, Sec. 8(c); 43 Stat. 940; 28 U.S.C. 230), the time for appeal was three months, but the new Code became effective prior to the judgment in this case and was applicable to the appeal herein.

This precise point was decided by the Court of Appeals for the Ninth Circuit on December 16, 1949, in *Cutting v. Bullerdick,* 178 F. (2d) 774, supra. In that case a final judgment of the District Court in Alaska was entered on April 8, 1949, and the only document filed within thirty days thereafter was a notice of motion to stay execution on the ground that appellant desired to perfect an appeal. The Court of Appeals held:

(a) Section 2107 of the Judicial Code enacted June 25, 1948, limiting the time of appeal to thirty days from the entry of judgment applies to appeals from the District Court of Alaska.[4]

(b) The notice of motion to stay execution was a sufficient notice of appeal.

The *Cutting* case was decided by Chief Judge Denman and Circuit Judges Bone and Orr on December 16, 1949, after the Court in the instant case (Judges Healy, Bone

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[4]Appellants, in the *Cutting* case, argued—as did the appellant in the case at bar on the petition for writ of mandamus (see p. 5, footnote 2, supra)—that section 2107 of the Judicial Code did not apply to appeals from the District Court for the Territory of Alaska. In ruling against this contention the Court of Appeals pointed out that section 2107 is a part of Chapter 133 of Part V of the Judicial Code entitled "Procedure," and that this chapter is supplementary to Chapter 83 of Part IV providing for appeals to courts of appeals, section 1294(2) of which directs that appeals from the District Court for the Territory of Alaska be taken to the Court of Appeals for the Ninth Circuit. The court concluded that sections 1294 and 2107 repealed old sections 225 and 230, pointing out that were section 2107 not presently in effect there would be no time limit on Alaskan appeals.

and Orr, sitting) had ordered the District Court to reinstate the appeal; after petitioner's motion to dismiss had been filed; and one month before that motion was denied (Judges Healy, Bone and Pope, sitting).

If the decision of the *Cutting* case that Section 2107 of the Judicial Code applies to Alaska is correct, and we submit that it is clearly correct else there would be no time limit on appeals taken from Alaska (see *Cutting v. Bullerdick*, supra, at p. 775), then the decision in the instant case is squarely in conflict with numerous decisions of this Court,[5] other Courts of Appeals,[6] and with other decisions

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[5]Examples are:
Alaska Packers v. Pillsbury (1937) 301 U.S. 174, 177;
George v. Victor Co. (1934) 293 U.S. 377, 379;
Old Nick Williams Co. v. United States (1910) 215 U.S. 541, 545.

[6]Examples are:
1st Circuit:
Sosa v. Royal Bank of Canada (1943) 134 F.2d 955, 956.
2nd Circuit:
Mosier v. Federal Reserve Bank of New York (1942) 132 F.2d 710, 711-712.
3rd Circuit:
Donaldson v. Baltimore Acceptance Corporation (1930) 38 F.2d 215, 217.
4th Circuit:
Robertson v. Morganton Full Fashioned Hosiery Co. (1938) 95 F.2d 780, 781.
5th Circuit:
Lamb v. Shasta Oil Co. (1945) 149 F.2d 729, 730.
6th Circuit:
Wolfinger v. Mueller (1948) 165 F.2d 844, 847, 849.
7th Circuit:
Fine v. Paramount Pictures (1950) 181 F.2d 300, 304.
8th Circuit:
United States v. Nordbye (1935) 75 F.2d 744, 747; certiorari denied (1935) 296 U.S. 572.
10th Circuit:
De Jordan v. Hudspeth (1943) 137 F.2d 943, 944; certiorari denied (1943) 320 U.S. 779.
District of Columbia:
Covey v. Williamson (1923) 286 Fed. 459, 461.

of the Court of Appeals for the Ninth Circuit itself,[7] that the requirement of the taking of an appeal within the time allowed by law is mandatory and jurisdictional and cannot be extended by action of any Court or of the parties themselves.

The record is bare of any order or document that might conceivably be considered a sufficient notice of appeal[8] or that could extend respondents' time to appeal under the extension provision of Section 2107 of the Judicial Code quoted above. In any event, the latter clause could not apply to this appeal since it permits only a thirty-day extension and the notice of appeal in this case was filed eighty-four days after entry of judgment.

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2. **THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

In view of the hitherto unanimous agreement by the Federal Courts that the requirement of timely filing of an appeal is mandatory and jurisdictional, the action of the Court of Appeals is a complete departure from established procedure and should be corrected by this Court.

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[7]Examples are:
9th Circuit:
Smiddy v. Johnston (1940) 110 F.2d 1015;
Dang Nam v. Bryan (1935) 78 F.2d 720.

[8]Compare:
Georgia Lumber Co. v. Compania (1945) 323 U.S. 334, 336;
Leishman v. Associated Electric Co. (1943) 318 U.S. 203, 205;
R. F. C. v. Prudence Group (1941) 311 U.S. 579, 582;
Wayne Gas Co. v. Owens Co. (1937) 300 U.S. 131, 135.

The departure is more startling and confusing by reason of the fact that although the jurisdictional question was argued to the Court on four different occasions during the course of the appeal, no opinion was written by the Court on three of these occasions, and, on the fourth, the opinion (on the merits) makes no reference to the question.

Of course if it be assumed that the Court of Appeals—without opinion—decided the question of jurisdiction differently from its virtually contemporaneous decision in *Cutting v. Bullerdick,* then an additional ground for certiorari appears in that, in a matter of Federal law which can only arise in the Ninth Circuit (jurisdiction of appeals from Alaska), successive decisions on the same question are flatly in conflict.

The action of the Court of Appeals, contradicting as it does all other decisions on the subject as well as its own decision on the precise point made during the same term, requires the exercise by this Court of its supervisory power.[9]

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[9]In a similar situation arising out of conflicting decisions between courts composed of different judges within the Ninth Circuit this Court granted certiorari and at the same time remanded for further proceedings, including leave to petitioner to apply for a hearing before the court *en banc.*

United States ex rel. Robinson v. Johnston (1942) 316 U.S. 649;

Robinson v. Johnston (9 Cir. 1942) 130 F.2d 202.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
January 19, 1951.

Respectfully submitted,
FRANCIS R. KIRKHAM,
SOUTHALL R. PFUND,
ALLAN R. MOLTZEN,
Attorneys for Petitioner,
Vuka Radovich Stepovich, Executrix of the Estate of Mike Stepovich, Deceased.

JULIAN A. HURLEY,
Of Counsel.

(Appendix Follows.)

Appendix

Act of February 13, 1925, c. 229:

"Sec. 8 (c). No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree" (43 Stat. 940).

Act of June 25, 1948, c. 646:

"Sec. 1291. *Final decisions of district courts*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court" (62 Stat. 929).

"Sec. 1294. *Circuits in which decisions reviewable*

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(2) From the District Court for the Territory of Alaska or any division thereof, to the Court of Appeals for the Ninth Circuit;" (62 Stat. 930).

"Sec. 2107. *Time for appeal to court of appeals*

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal may be filed within ninety days after the entry of the order, judgment or decree appealed from.

The district court, in any such action, suit or proceeding, may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11" (62 Stat. 963).

"Sec. 38. The provisions of this Act shall take effect on September 1, 1948" (62 Stat. 992).

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

GEORGE B. GRIGSBY,
Central Building, Anchorage, Alaska,
Attorney for Respondents.

WARREN A. TAYLOR,
WILLIAM V. BOGGESS,
Fairbanks, Alaska,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The above-named respondents respectfully pray that that the petition for writ of certiorari in the above-entitled cause be denied.

OPINION BELOW.

The above-named petitioner has requested review by this Court of the judgment of the Court below entered on the 25th day of October, 1950, and appearing at R. 319. The opinion of Court below is reported at 184 F. (2d) 705.

JURISDICTION.

The petitioner invokes the jurisdiction of this Court under Title 28, United States Code, Sections 1254, 2101.

STATEMENT OF THE CASE.

Respondents adopt petitioner's statement of the case except that portion of the statement which purports to set out the holding of the Court below in the case of *Cutting v. Bullerdick* (9 Cir. 1949) 178 F. (2d) 774, appearing at page 5 of the petition.

ARGUMENT.

I. INTRODUCTION.

This introductory statement is made in order to assist this Court in its determination of whether or not a writ of certiorari should be issued in the instant case and in order to furnish a background against which respondents' argument in opposition thereto can be more clearly understood.

From September 1, 1948, when Title 28 of the United States Code, as revised, became law,[1] until July 18, 1949, when the Federal Rules of Civil Procedure were expressly extended to the District Court for the Territory of Alaska,[2] the question of what time limit governed appeals from the Territorial Court to the Circuit Court of Appeals was unsettled.

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[1]Act of June 25, 1948, Chapter 646:

"An Act to revise, codify, and enact into law Title 28 of the United States Code entitled 'Judicial Code and Judiciary.' *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That Title 28 of the United States Code, entitled 'Judicial Code and Judiciary' is hereby revised, codified, and enacted into law, and may be cited as 'Title 28, United States Code, Section .....,' as follows:

* * * * * * *"

(United States Statutes at Large, Vol. 62, Part 1, p. 869.) September 1, 1948, was the effective date of the Act. Title 28, United States Code, Section 38.

[2]Act of July 18, 1949, c. 343, sec. 1, 63 Stat. 445:

"The rules heretofore or hereafter promulgated and made effective by the Supreme Court of the United States under authority of section 2072 of Title 28, or under authority of any other statute, regulating the forms of process, writs, and motions, and the pleadings, practice, and procedure in actions of a civil nature in the district courts of the United States, *and regulating appeals therefrom, shall apply to the District Court for the Territory of Alaska and to appeals therefrom.*" (48 USCA, Sec. 103a, at page 30 of the 1949 Cumulative Pocket Part.) (Italics supplied by respondents.)

Prior to September 1, 1948, the time limit for appeals from the Territorial Court was contained in the Act of February 13, 1925, Chapter 229, sec. 8(c) (43 Stat. 940) as amended by the Act of January 31, 1928, Chapter 14, Sec. 1; 45 Stat. 54, which provided as follows:

> "No appeal intended to bring any judgment or decree before a circuit court of appeals shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree." (28 USC, Sec. 230.)

After July 18, 1949, under Rule 72 of the Federal Rules of Civil Procedure, the time limit became thirty days.

On September 1, 1948, the Act of February 13, 1925 (above quoted), was included in the schedule of laws repealed by the new Title 28.[3] By Section 2107 of that same title, the time limit for appeals was set at thirty days from the date of judgment. However, Section 2107 was not, by its terms, expressly or impliedly applicable to appeals from the Territorial Court.[4]

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[3]Title 28, United States Code, Section 39.

[4]The portions of Section 2107 material to the consideration of the petition are, as follows:

> "Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree. • • •
>
> "The district court, in any such action, suit or proceeding, may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree."

In this interim period of doubt, both the instant case and the case of *Cutting v. Bullerdick,* 178 F. (2d) 774, relied on by petitioner came before the United States Court of Appeals for the Ninth Circuit for review. In the instant case, respondents applied for allowance of appeal from the judgment of the District Court more than thirty days from the date of rendition. (R. 25.) In the *Bullerdick* case, formal notice of appeal was also filed more than thirty days from the rendition of judgment. However, in the latter case a notice of motion to stay execution proceedings was served on appellee's attorneys within thirty days of the date judgment was rendered.

Inasmuch as "action, suit or proceeding" in the first paragraph of Section 2107, setting out the time limit for appeals is qualified by paragraph four of that section, commencing as follows: "The district court, *in any such action, suit or proceeding"* and in view of the further fact that Congress had defined the term "district court" wherever employed in Title 28 as those Courts constituted by Chapter Five of that Title,[5] of which the Territorial Court is not one, it is immediately apparent that considerable doubt pre-

[5]Title 28, United States Code, Section 451:

"As used in this title:

* * * * * * *

The terms 'district court' and 'district court of the United States' mean the courts constituted by Chapter 5 of this title.

* * * * * * *"

vailed as to applicability of that section when these two cases arose.[6]

Under the circumstances, any argument about Congressional intent would be largely fictitious, but, if the game must be played, there is sufficient evidence that Section 2107 was not intended to be made applicable to the Territorial Court. Since the question is more properly reserved for determination if certiorari is granted, it is sufficient to observe that Congress, in extending the rules of Civil Procedure to the District Court of the Territory of Alaska, made it very clear that the rules of this Court, with respect to appeals, were made applicable to the Territory,[7] although the power to regulate appeals by this Court was not so clearly conferred.[8] So it is arguable that Congress was aware of a void in the time limit governing appeals from the Territorial Court, or that it had inadvertently repealed the law theretofore governing such appeals.[9]

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[6]It is interesting to note that the phrase "in any such action, suit or proceeding" appearing in the fourth paragraph of Section 2107 was deleted by Act of May 24, 1949, c. 139, secs. 107, 108, 63 Stat. 104, 105. This indicates, perhaps, Congressional awareness of a hiatus in the law governing the time limit on appeals from the Territorial Court.

[7]See footnote 2, supra, setting out the extension act in full.

[8]Title 28, United States Code, Section 2072.

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions and the practice and procedure of the district courts of the United States in civil actions.
> * * * * * * * *"

This section was amended by Act of July 18, 1949, c. 343, sec. 2; 63 Stat. 446 to extend this Court's rules making power to the District Court for the Territory of Alaska.

[9]For further indications of Congressional intent not to embrace the District Court for the Territory of Alaska within the provisions of Section 2107, this Court is referred to respondent's brief in support of petition for writ of mandamus. (R. 328.)

Against this background, the validity of petitioner's argument in support of petition may be analyzed.

II. ANSWER TO PETITIONER'S FIRST REASON FOR GRANTING WRIT.

The first reason assigned by petitioner for granting the writ is an alleged conflict between the holding of the Court below in the instant case and the decisions of this Court, of other Courts of Appeals and its own decisions on an important question of Federal Law. (Petition for Writ, p. 7.)

Since the implied holding of the Ninth Circuit in sustaining respondents' petition for a writ of mandamus to compel the District Judge of the Territory of Alaska for the Fourth Division to allow an appeal (R. 335) and in entertaining that appeal was that Section 2107 was not applicable to appeals from the Territorial Court, the alleged conflict between that holding and the holdings in the cases cited by petitioner does not exist. Inasmuch as the question confronting the Ninth Circuit was one of whether or not Section 2107 was applicable to the Territorial Court, this question was one which could be determined only by the Court below and this Court if certiorari is granted, and, of course, could not be determined by any other United States Court of Appeals. Only by indulging in the presumption that the Court below willfully exceeded its jurisdiction could the cases cited by petitioner be found to be in conflict with the instant holding. A careful perusal of those cases indicates

only that the requirement that an appeal be initiated within a certain time is jurisdictional. Assuming, without concession, that such holdings state a categorical proposition of law applicable even where the time limit for appeals is shrouded in doubt, still those holdings do not conflict with the decision of the Court below which was necessarily that the time limit for appeals had not expired.

If this analysis is accepted, it is equally clear that no important question of Federal law is presented by this petition. If certiorari were now granted, the most that could be determined by this Court would be that the Court below was in error in holding Section 2107 inapplicable to the Territorial Court, thus depriving the respondents of any opportunity to have the merits of their case against petitioner submitted to a jury—which submission was erroneously prevented by the District Court for the Territory of Alaska.[10] Such a determination would not operate as a guidepost to future litigants, as no question now exists or has existed as to the time limit for appeals from the Territorial Court since July 18, 1949.[11] The construction of Section 2107 by this Court would affect only these litigants and its significance could only be historical and local.[12]

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[10]Opinion of Court below (R. 309), particularly that portion of the opinion appearing at R. 316.

[11]Supra, footnote, 2, p. 3.

[12]Certiorari, as brought in the instant case, is an appropriate remedy only in cases of public interest or to reconcile conflicting holdings between circuit courts of appeal on an important question of federal law.

Forsythe v. Hammond, 166 U.S. 506, 17 S. Ct. Rep. 665;
Magnum Import Co. v. Coty, 262 U.S. 159, 67 L. Ed. 922, 43 S. Ct. 531.

Petitioner lays much stress on *Cutting v. Bullerdick,* supra. A careful analysis of the decision in that case reveals that that portion of the opinion indicating that Section 2107 is applicable to the Territorial Court was unnecessary to the conclusion of the Court and should be classified as dicta. Inasmuch as the Court below decided that a sufficient notice of appeal (the notice to stay execution proceedings referred to, supra), was filed within thirty days of judgment, there was no necessity to discuss the applicability of Section 2107 since, in any event, a timely appeal had been made.

III. ANSWER TO PETITIONER'S SECOND REASON FOR GRANTING.

The second reason assigned by petitioner is the alleged departure by the Court below from the accepted and usual course of judicial proceedings calling for an exercise of this Court's power of supervision. (Petion for Writ, p. 10.)

The alleged departure apparently consists, as mentioned by petitioner, in a supposed holding by the Court below that a timely filing of notice is not mandatory nor jurisdictional. (Petition for Writ, p. 10.) As previously pointed out, such a supposed holding must rest on the assumption that the Court below willfully exceeded its jurisdiction—an untenable proposition.

Petitioner also argues that the decision in the *Cutting* case is flatly in conflict with the entertain-

ment by the Court below of an appeal in the instant case. Since, as previously pointed out, the applicability of Section 2107 was unnecessary to the decision of the *Cutting* case, no such flat conflict exists.

Nor, assuming the existence of such conflict, would such successive decisions call for the exercise of this Court's power of supervision. The most startling proposition conceivable by these respondents is that judges must never change their minds.

CONCLUSION.

Since no important question of Federal law has been presented by the petition for writ of certiorari, and since no conflict exists between the holdings of the Court below in the instant case and the holdings of this Court and other Courts of Appeal, respondents pray that the petition be denied.

Dated, Fairbanks, Alaska,
February 16, 1951.

Respectfully submitted,
GEORGE B. GRIGSBY,
Attorney for Respondents.

WARREN A. TAYLOR,
WILLIAM V. BOGGESS,
Of Counsel.